



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CRIMINAL APPEAL No. 61 OF 2014**

**M'IKUYU KAINDIO .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellant M'ikuyu Kaindio was arraigned before Tigania Senior Principal Magistrate's court on 12<sup>th</sup> May, 2014 with one count of exposing beer for the purpose of selling without a licence contrary to Section 34(a) of the Alcoholic Drinks Control Act. He pleaded guilty to the charge and was sentence to six months imprisonment. No option of fine was given.
2. Being aggrieved by the sentence the Appellant filed this appeal and urges four grounds of appeal in his petition of Appeal namely:-
  1. **The learned Ag. Senior Resident Magistrate erred in law by failing to consider that the appellant is a first offender.**
  2. **The learned Ag. Senior Resident Magistrate erred in law in totally failing to consider the appellants mitigation.**
  3. **That the Learned Ag. Senior Resident Magistrate erred in law in not considering the principles of sentencing.**
  4. **The sentence is harsh as there was no option of fine.**
3. The appeal was urged by Mr. Ayub Anampiu for the Appellant and Mr. Moses Mungai Prosecution Counsel for the State.
4. Mr. Anampiu urged that the learned trial magistrate failed to consider the fact the applied pleaded guilty to the charge and therefore consider him for a non custodial sentence. Counsel urged that the Appellant's mitigation was also ignored.
5. Mr. Mungai opposed the appeal and urged the court to dismiss same as the sentence prescribed under the section charged was a fine of Kshs.500,000/- and imprisonment not exceeding 3 years or both learned Senior Prosecution Counsel urged that six months imprisonment was lenient.

6. The Appellant was found with bottled beers, mostly from Kenya Breweries, in a market place. The offence was exposing the beers without a license as per the statement of the charge. In the particulars the charge accused the Appellant of selling the alcoholic drinks without a license.
7. When the Appellant admitted the offence, the prosecution did not provide any facts but stated **“facts as per the charge sheet”**.
8. **“Facts as per charge sheet”** should not be accepted by a trial court especially at the stage of plea; as the charge does not provide any facts. What a charge provides is a statement of the offence and the law contravened and particulars of the charge.
9. Facts can only be stated by the prosecution especially where an accused person wishes to plead guilty to the charge. I am guided by Adan v Rep. (1973) EA446 where the court set out the proper manner of taking a plea as follows:

**“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused’s reply must, of course, be recorded.”**
10. Guided by the above case, it is clear that the learned trial magistrate did not take a proper plea in this case. Even though the Appellant did not challenge the conviction, I find that the same was based on defective proceedings. The facts to the charge were not given. That omission was fatal to the conviction.
11. The particulars of the charge did not support the statement of the offence. The reason is the statement of the offence alleged that the Appellant had exposed beer for purposes of selling without a license. The particulars alleged that the Appellant was found selling alcoholic drinks without a license.
12. The statement of the offence and the particulars of the same were so contradictory that the Appellant could not have been able to know what offence it was alleged he had committed. Such contradiction rendered the proceedings defective and the conviction vitiated.
13. For all these reasons I find the plea of guilty entered herein equivocal and the conviction null and void. Accordingly I quash the conviction and set aside the sentence.
14. The next issue to consider is whether to order a retrial. The factors the court should consider before determining whether or not to order for a retrial were discussed by the Court of Appeal in the case of Bernard Lolimo Ekimat v Rep CA 151 of 2004 where the court of appeal held:

**“In the case of Ahmend Sumar vs Republic (1964) E.A. 481, at page 483, the predecessor to this court stated as follows:-**

**“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view, follow that a retrial should be ordered.”**

**The court continued at the same page at paragraph II and stated further:-**

**“We are also referred to the judgment in Pascal Clement Braganza vs R. (1957) EA 152. In this judgment the court accepted the principle that a retrial should not be consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.”**

15. I have considered the circumstances and the facts of this case. The Appellant has served a third of the sentence imposed against him in the case. I find it will cause the Appellant suffering and hardship if I order a retrial in this case.

**16. I decline to order a retrial. The Appellant should be set at liberty forthwith unless he is otherwise lawfully held. The result is that the Appellants’ appeal succeeds.**

**DATED, SIGNED AND DELIVERED AT MERU THIS 10<sup>TH</sup> DAY OF JULY, 2014.**

**LESIIT, J.**

**JUDGE**